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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NO. [redacted] 178

LOCAL NO. 201, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO) and DONALD F. BRUSTAD, Individually and as President of said Local No. 201,
Petitioners,

vs.

CITY OF MUSKEGON, a Municipal Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NO. 1150

LOCAL NO. 201, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO) and DONALD F. BRUSTAD, Individually and as President of said Local No. 201,

Petitioners,

vs.

CITY OF MUSKEGON, a Municipal Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

(Italics ours unless otherwise indicated)

On March 14, 1961, the Muskegon City Commission adopted the following preamble and resolution:

> "61-165. *Resolution on Banning of Union Affiliation by Police Officers Adopted.*

> "Certain of the Police Officers of the City of Muskegon Police Department are dues paying members of Local No. 201, Muskegon County and Municipal Employees Union affiliated with the American Federation of State, County and Municipal Employees, AF of L, CIO.

"This Commission, as well as past Commissions, have seriously questioned whether a police officer can be a member of such a union and still enforce, impartially and without prejudice the laws of our city, county and state of Michigan.

"Every police officer who joins the Muskegon Police Department must take an oath of office to support the constitution and bear allegiance to his city and state and its constitution and laws and to the best of ability, skill and judgment, diligently and faithfully, without partiality or prejudice, execute his office. Police officers are invested with broad powers, few of which are given to any other government employee. They have the legal right to carry a weapon, their powers of restraint, arrest and control of moral and physical behavior of others are grave and serious. A police officer is required by law and invariably becomes a neutralizer in controversies involving the right of public assemblage, neighborhood disputes, domestic difficulties and strikes, between labor and management. Again, his actions in these instances must be governed by his oath of office. He must recognize certain rights of people among which is the right of collective bargaining on the part of labor. Yet, at the same time, he must protect the rights and the property of management. In this instance, again, his neutrality must be the watchword of his every activity in the effort to protect the life and property of all those involved and to preserve peace and order during periods of such difficulty.

"This Commission subscribes to this statement of responsibility and, as such, cannot further condone police officers of the City of Muskegon to continue to be members of a union.

"In the belief that we are acting in the best interest of all of the citizens of the City of Muskegon, the following resolution is presented:

"Commissioner Carlson offered the following resolution and moved its adoption:

"No Police Officer of the City of Muskegon Police Department shall hereafter be, or become,

> a member of any organization in any manner identified with any Federation or Labor Union which admits to membership persons who are not members of the Muskegon Police Department, or which would in any way exact prior consideration and prevent such officer from performing full and complete police duty at any time. Any Police Officer now a member of such unions shall disassociate himself within thirty days from this date. Failure to comply will constitute reason for immediate dismissal" (56a-58a).

On March 16, 1961, the following Rule was promulgated by the Chief of Police of the City of Muskegon and approved, in writing, by the City Manager in keeping with the provisions of Sec. 2-203 of the Code of Ordinances of the City of Muskegon (52a-53a):

> "*Section 101:* No Police Officer of the City of Muskegon Police Department shall hereafter be, or become a member of any organization in any manner identified with any Federation or Labor Union which admits to membership persons who are not members of the Muskegon Police Department, or which would in any way exact prior consideration and prevent such officer from performing full and complete police duty at any time. Any Police Officer now a member of such unions shall disassociate himself within thirty days from this date. Failure to comply will constitute reason for immediate dismissal" (52a).

On April 7, 1961, plaintiffs filed two suits. Both suits were initially based upon the assumption that the above "Resolution" was in fact an "Ordinance". The first suit was a petition for writ of mandamus designed to compel the City Commission to reconsider its action, and if not entirely repealed, to submit the matter to a referendum vote in keeping with the provisions of Chapter 7 of the Charter of the City of Muskegon which applied to Ordinances (5a-7a). The second suit was a bill of complaint praying for a temporary injunction prohibiting enforcement of the "Ordinance" or any regulation or rule adopted

by the Police Department pursuant thereto pending completion of the mandamus proceeding (48a-50a). An amended and supplemental bill of complaint was later filed praying for a permanent injunction (51a-70a).

Orders to show cause were issued in each case and a temporary injunction was issued in the chancery case (8a, 50a). Answers were filed and issue joined (9a-14a, 51a-58a, 72a-76a).

By stipulation, the cases were consolidated for hearing, and proofs taken in one case were to be considered as proofs in the other (198a-199a).

Proofs were taken on April 11 and 17, 1962 (198a, 210a). Aside from testimony as to purely formal matters such as the adoption of the resolution, etc. (198a-231a), the only testimony presented was the testimony of the petitioner, Donald F. Brustad, who testified that he was a police officer and president of Local 201 (231a).

As to his duties where strikes were involved, he testified, in part:

> "A. I was only called on two of the strikes. One at the Sheldon, where they had a picket line up across the railroad tracks preventing the train to move in. I talked to one of the persons from the management side and one of the pickets there, and the engineer of the train. I called for the Lt. to come down and settle the issue there. And, by the time he got there, the engineer of the railroad said, 'well we will honor the picket lines', and they pulled their train out across for Getty Street.
>
> "The only other time we were called in by Fred A. Drata, at the present time President of the Brunswick Local because they had a man under the influence of alcohol on the picket line, and he did not want him there. We went down there, took him off the picket line, and placed him in the county jail, I believe, if my recollection is correct."

On April 6, 1961, an initiatory petition had been filed for a referendum vote on the following proposition:

> "THE CITY OF MUSKEGON ORDAINS:
>
> ALL NON-SUPERVISORY CITY EMPLOYEES, WITHOUT EXCEPTION, SHALL HAVE THE RIGHT TO ORGANIZE INTO UNIONS OF THEIR OWN CHOOSING AND TO BARGAIN COLLECTIVELY, OR TO REFRAIN FROM SUCH ORGANIZATION. THIS ORDINANCE SHALL NOT BE CONSTRUED TO AUTHORIZE STRIKES OR OTHER CONCERTED WORK STOPPAGES. THIS ORDINANCE SHALL BECOME EFFECTIVE TEN DAYS AFTER ENACTMENT" (16a).

In keeping with the suggestion of the trial court made in the course of argument in the mandamus case (15a), the above proposition was submitted to the voters of the City of Muskegon at a special election on June 12, 1961. The proposal was *defeated* by a vote of 2,841 to 2,418 (18a).

In an opinion filed June 14, 1961, the trial court held that the action of the City Commission of March 14, 1961, was not an ordinance (39a-40a). Since the action was held not to be an ordinance, the Charter provisions for a referendum vote were inapplicable, and the writ of mandamus was, therefore, denied (40a, 47a). The opinion (19a-47a) contained dictum to the effect that the resolution and rule were nullities for reasons amplified in a later opinion. The court ordered that the injunction previously issued in the chancery case continue until an opinion was filed in the chancery case (41a).

On October 24, 1961, the court filed a lengthy opinion in the chancery case (77a-196a) authorizing a decree permanently enjoining the City of Muskegon from giving effect to the resolution adopted March 14, 1961, or any regulation or rule adopted by the Muskegon Police Department or any other city agency pursuant thereto or in accordance therewith. A decree was entered accordingly (196a). Appeal was taken from the decree entered in the chancery case to the Supreme Court of the State of Michigan (197a-198a).

By unanimous opinion issued March 7, 1963, the Su-

preme Court of Michigan reversed the trial court decree, holding that the regulation was reasonable and proper and infringed no constitutional rights of petitioners (I-XII).

REASONS WRIT SHOULD BE DENIED

It has long been well settled law, based upon the soundest of legal principles, that a municipality may prohibit its police officers from belonging to labor unions which either admit to membership non-police officers or are affiliated with organizations with include non police officers as members.

The reason for the rule was stated in *Fraternal Order of Police vs. Lansing Board of Police and Fire Commissioners*, 306 Mich. 68, in which certiorari was denied by this Court in 321 U. S. 784, as follows:

> "A police officer is peculiar, sui generis, you may say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force, organized under the laws of the United States and equally as important as to the functions it is required to perform.
>
> * * * It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of a controlling head just as much as the common soldier must surrender his own opinion and power of action to that of his commanding officer. And there is the same necessity of discipline — of regulation existing in the police department that exists in regard to the military department."

Certiorari was also denied by this Court in the similar case of *State Lodge of Michigan, Fraternal Order of Police vs. City of Detroit*, 318 Mich. 182, 332 U. S. 818.

It should be noted that the rule involved in this case does not go nearly as far as rules which have been sustained by this Court in other cases. The rule adopted by the City of Muskegon *does not* preclude membership in *any* labor union. Police officers of the City of Muskegon are free to

form their own union and many rights are guaranteed to them under the laws of the State of Michigan. For example, Michigan's Hutchinson Act (*M. S. A.* 17.455 (1)) and Michigan's Mediation of Disputes Act (*M. S. A.* 17.454 (1) et seq.) contain the following provisions:

> "• • • That nothing contained in this act shall be construed to limit, impair or affect the right of any *public employee to the expression or communication of a view, grievance, complaint or opinion* on any matter related to the conditions, or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment."

Section 3 (*M. S. A.* 17.455 (3)) provides in part:

> "No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike • • • nor shall any such person *discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance* in accordance with the provisions of Section 7 of this act."

Section 7 (17.455 (7)) of the act provides:

> "Upon the request of a majority of any *given group of public employees* evidenced by a petition signed by said majority and delivered to the labor mediation board, or upon request of any public official in charge of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievance set forth in said petition or notice, and for the purpose of mediating such grievance, the labor mediation board shall exercise the power and authority conferred by said board by Sections 10 and 11 of Act No. 176 of the Public Acts of 1939 (Mediation of Disputes Act)."

The rule involved in *City of Jackson vs. McLeod*, 199 Miss. 676, 24 So. 2d 319, in which certiorari was denied by

this Court in 328 U. S. 863, precluded police membership in *any* union.

The same was true in *Hutchinson vs. Magee*, 278 Pa. 119, 122 A. 234; *McNatt vs. Lauther*, (Tex. Civ. App.) 223 S. W. 503; *San Antonio Fire Fighters' Union vs. Bell*, 223 S. W. 506; and *Carter vs. Thompson*, 164 Va. 312, 180 S. E. 410.

See also *King vs. Priest*, 357 Mo. 68, 206 S. W. (2d) 547, in which an appeal to this Court was dismissed in 333 U. S. 852 and rehearing denied in 333 U. S. 878.

The rule is summarized in the very fine annotation appearing in 31 *A. L. R.* (2d) page 1149 as follows:

> "The right of public employees in general to join or become members of labor units is becoming increasingly recognized, *with the one marked exception that municipal firemen and policemen*, and in some instances public school teachers (this is not universally true) *are barred from union membership*. Policemen and firemen are denied union membership because they owe *undivided allegiance to the public*, and because it is absolutely necessary to the maintenance of discipline in the two services that public authorities have complete control over them."

The only reason suggested by petitioners for this Court reviewing a rule of law which has been established with unanimity is that all of the decisions were made prior to the year 1947. Petitioners cite some wholly unrelated and totally dissimilar cases dealing with racial problems and quotes broad language from those cases as supporting petitioner's position. While it may be necessary for members of the N.A.A.C.P. to associate and band together for the "advancement of ! lief and ideas" in Little Rock, Louisiana and Alabama in order to exercise their constitutional rights of free speech, press and assembly, it is not suggested that it is necessary for the police officers of the City of Muskegon to associate and band together to exercise their rights of free speech, press and assembly. The only real reason which might be suggested for plaintiff's request that the well established rule be reviewed is an intense desire on the part of the American Federation of State, Coun-

ty and Municipal Employees, to have police officers as members.

A. Burden of Proof.

It was unquestionably the fact that the trial judge in this case fell into the pitfall of placing the burden of proof upon the City of Muskegon that led him into error. It is also quite apparent that he was mislead by broad statements of law, taken completely out of context and from wholly unrelated cases, that resulted in this error. The correct rule, long established by precedent, is stated in 11 *Am. Jur. Pr.*, page 1088-1089 as follows:

> "All general principles relating to the *presumptions of validity* surrounding legislation and to the *duty of the courts to uphold* legislative action if possible *apply with particular emphasis to exercises of the police power.* The constitutionality of such measures is presumed, and it must also be presumed that the legislature has carefully investigated and determined that the interests of the public require such legislation, for the courts are reluctant to attribute a want of good faith in the exercise of the power. Moreover, it is their *duty to sustain police measures unless such are clearly, plainly, and palpably in violation of the Constitution.* It is *not enough that the case is a doubtful one*; the act must be so clearly unreasonable that the court can say that *no fair-minded man can think it reasonable.* An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance."

Speaking specifically of the exercise of police powers by municipalities, it is stated in 11 *Am Jur. Pr.*, page 1092, that:

> "A city, as the arm of the state, has in the exercise of the police power a wide discretion in determining what precautions in the public interest are necessary and appropriate under the circumstances. Its exercise of the police power will *not be interfered with by the courts in the absence of a clear abuse of discretion,*

> *unless it is manifestly unreasonable* and oppressive, for it is no within the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations to pass ordinances relating to objects within the proper domain of the police power."

If petitioners' position were sound, the City of Muskegon could not ban its police officers from being members of the Communist Party without being prepared to prove that such membership created a "clear and present danger in the orderly processes of government." It took the F. B. I. many years of intensive investigation, and it took many months of trial to convict the eleven Communists a few years ago, and it is doubtful if the total cost to the Government has ever been computed. See *U. S. vs. Dennis*, 341 U. S. 494, wherein the Court observed: "The trial of this case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages."

It is doubtful that the City of Muskegon could ever amass the evidence, much less bear the expense, of proving in a court proceeding that membership by one of its police officers in the Communist Party constituted a "clear and present danger to the orderly processes of government." Certainly the City of Muskegon could not prove that membership of one of its officers in the Ku Klux Klan posed a "clear and present danger," and yet we do not believe that plaintiffs would argue that such membership could not be prohibited. It is doubtful if the City of Pontiac could ever have proved by competent evidence, admissible in court, that membership in the "Black Legion" or "Unknown Legion" of one of its police officers created a "clear and present danger," but see *Mapley vs. City of Pontiac*, 288 Mich. 396.

Petitioners blandly assert in a footnote on page 6 of the Brief that "It is emphasized that there is no evidence in the record which would justify this assumption", that is, that membership in a union affiliated with unions admitting non-police officers to membership might result in "split loyalty". This statement is contrary to the facts.

Even if the City of Muskegon had the burden of proof of showing that "split loyalty" might result, the evidence shows that its fears in this respect were quite well-founded. We direct attention to the testimony of Officer Donald F. Brustad relative to his activities in connection with the Sheldon strike. He testified:

> "I was only called on two of the strikes. One at the Sheldon, where they had a picket line up across the railroad tracks preventing the train to move in. I talked to one of the persons from the management side and one of the pickets there, and the engineer of the train. I called for the Lt. to come down and settle the issue there. And, by the time he got there, the engineer of the railroad said, 'well we will honor the picket lines', and they pulled their train out across for Getty Street."

At the time the above activity took place, *M. S. A.* 17.454 (10.5), known as Michigan Bonine-Tripp Act, clearly provided:

> "It shall be unlawful (1) for any person or persons to hinder or prevent by mass picketing, unlawful threats or force the pursuit of any lawful work or employment, (2) *obstruct or interfere with entrance to or egress from any place of employment*, (3) *to obstruct or interfere with free and uninterrupted use of* public roads, streets, highways, *railways*, airports or other ways of travel or conveyance, or (4) to engage in picketing a private residence by any means or method whatever; Provided, That picketing to the extent that the same is authorized under constitutional provisions, shall in no manner be prohibited. Violation of this section shall be deemed a misdemeanor and punishable as such."

It is quite apparent from Officer Brustad's testimony that the above statute was being violated. As he put it, "they had a picket line up across the railroad track preventing the train to move in" (240a). The trial court gave his testimony the same interpretation and referred to "where a picket line had been stopping trains" (117a).

Why was Officer Brustad sent to the Sheldon Plant? No doubt a complaint had been received indicating a violation of law. What was he expected to do? As a law enforcement officer he was, of course, expected to enforce the law. What did he do? He testified he talked to "one of the persons from the management side and one of the pickets there, *and the engineer of the train.*". What happened? Nothing except delay. He went on to testify that he called for the *Lieutenant to come down and settle the issue.* And what happened after that? According to Officer Brustad's testimony, by the time he (the Lieutenant) got there, the engineer said "well, we will honor the picket lines," and they pulled their train out across for Getty Street (240a).

It is quite apparent from this terse but enlightening bit of testimony that a train going into the Sheldon plant had been stopped by pickets contrary to law. It is equally apparent that the engineer's first intent was to proceed on into the plant, otherwise he would have left immediately and the police would not have been called. Why did the engineer change his mind? All we know is that he changed it *after* Brustad talked to him. No doubt he had other freight on the train which required delivery and the delay was vexing and expensive, but why the parting words "Well we will honor the picket line"?

We have no information as to how vital the shipment was to Sheldon or the economic loss that resulted from its non-delivery, just as we do not know exactly what Brustad said to the engineer.

This also points up the fallacy in petitioner's assumption that partiality on the part of an officer would be readily apparent and susceptible of proof. Such is simply not the case.

Had Brustad impartially, but firmly, advised the pickets that it was a violation of the Bonine-Tripp Act to obstruct entrance to or egress from a place of employment, or to interfere with the free and uninterrupted use of a roadway, it is fair to assume that they would have complied with the law. But what did Brustad do? He vacillated. First he talked to someone from management. Then he talked to a picket. Then he talked to the *engineer.* Then he called for the Lieutenant to do what he was sent to do in the first

place. The result: The law was not impartially upheld, and the Sheldon Company was deprived of a shipment it was lawfully entitled to receive.

While no one can say for certain that Brustad's failure to enforce the law resulted from a want of impartiality rather than mere ineptitude, he obviously approached the situation in a half-hearted manner and his effor resulted in a failure of law enforcement.

Rather than the record being void of any evidence to support the City's assumption, Brustad's own testimony supports it.

Even if the record were void of any evidence of a union member police officer having shown partiality in a labor-management dispute, this would not justify a conclusion that the regulation is unreasonable, any more than a showing that no theatre had even caught fire in the City of Muskegon would justify a holding that an ordinance requiring theatres to maintain fire escapes is unreasonable, arbitrary and void.

B. Rule Reasonable and Proper.

Compared to the rules which have been upheld in other states, the rule adopted by the Muskegon Police Department is extremely reasonable. As noted previously, the police officers are free to form their own union, to present grievances, and have those grievances mediated by the State Mediation Board. Most of the rules preclude membership in *any* labor union. As an example of extreme legislation, see *North Carolina Statute G. S.* 95-85 referred to in the *North Carolina Law Review*, Volume 38 (1960), page 198-200, which reads in part as follows:

> "No employee of the State of North Carolina, or of any agency, office, institution or instrumentality thereof, or any employee of a city, town, county or other municipality or agency thereof, or of any public employee or employees of an entity or instrumentality of government shall be, become, or remain a member of *any trade union, labor union or labor organization* which is, or may become, a part of or affiliated in any way

with any national or inter-national labor union, federation, or organization, and which has as its purpose or one of its purposes, collective bargaining with any employer mentioned in this article with respect to grievances, labor disputes, wages or salary, rates of pay, hours of employment, or the conditions of work of such employees . . . ."

The present case is on all four with *Perez vs. Board of Police Commissioners of the City of Los Angeles*, 78 Cal. App. 2d 638, 178 P. 2d 537.

For other cases upholding similar or more stringent rules, see *McQuillin, Municipal Corporations*, 3rd Ed., Vol 3, Sec. 12.141; *Ryan Labor Unions and Municipal Employe Law*, NIMLO, 1956, page 265, and *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 4, Sec. 12.243.

It is interesting to note in passing that the *National Labor-Management Relations Act* of 1957, Section 159, *F. C. A. Tit.* 29, Sec. 159 (b) places a similar restriction upon plant guards who perform a function similar to that of police officers. The provision prevents the National Labor Relations Board from recognizing, as an appropriate bargaining unit, any unit

> . . . . "if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards *if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership employees other than guards.*"

No one has suggested that the above provision is an unreasonable regulation in violation of Article I of the Constitution or any other provision thereof.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: June 13th, 1963.

Respectfully submitted,

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